In the District Court of the United States for the Middle District of Tennessee, Nashville Division

Civil Action No. 603

W. H. TOMPKINS COMPANY, NOW TOMPKINS MOTOR LINES, INC., PLAINTIFF-APPELLANT

v.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS-APPELLEES

MOTION TO AFFIRM

Appellees, pursuant to Rule 12, paragraph 3, of the Revised Rules of the Supreme Court of the United States, move that the decree of the District Court be affirmed.

This is a direct appeal from the final decree[1] entered on July 8, 1946, of a specially constituted district court of three judges established pursuant to the Urgent Deficiencies Act of October 22, 1913, dismissing appellant's complaint to set aside an order of the Interstate Commerce Commission.

[1] The court also made detailed Findings and Conclusions, though writing no opinion. One judge filed a short statement of dissent.

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Appeal was allowed on August 2, 1946, and appeal papers were served on August 6, 1946.[2]

The Commission's order dated January 6, 1945, granted appellant operating authority under the "grandfather clause" of Section 206 (a) of Part II of the Interstate Commerce Act as amended (49 U. S. C. 306 (a)) as a common carrier by motor vehicle of certain specified commodities between certain points specified in the order, over irregular routes.[3] By the same order

[2] It does not appear that notice of appeal was served upon the Attorney General of the State of Tennessee, in accordance with the provisions of 28 U. S. C. 45a.

[3] Appellant was authorized to transport:

Dairy products, eggs, and poultry from Murfreesboro, Tenn., to points in Georgia and those in Florida on and north of Florida Highway 30, and return with returned or rejected shipments.

Packing-house and dairy products, eggs, and poultry from Nashville to points in Georgia, North Carolina, and South Carolina, those in Alabama on and east of U. S. Highway 31 and those in Florida on and north of Florida Highway 30, and return with returned or rejected shipments.

Cotton-factory products from points in Georgia, North Carolina, and South Carolina and those in Alabama on and east of U. S. Highway 31, to Nashville, and return with returned or rejected shipments.

Canned and fresh fruits and vegetables and canned fruit juices from points in Florida on and north of Florida Highway 30 to Nashville, and return with returned or rejected shipments.

Coffee from Jacksonville, Fla., to Nashville, Tenn., and return with returned or rejected shipments.

Granite from Elberton, Ga., to Nashville, Tenn., and return with returned or rejected shipments.

Sugar from Fort Wentworth and Savannah, Ga., to Nashville, Tenn., and return with returned or rejected shipments.

appellant was authorized to transport general commodities between Nashville, Tennessee, and Atlanta, Georgia, over a regular route; but that portion of the Commission's order was not assailed by appellant and is not involved in the present suit.[4] Appellant claimed that it should have been given a larger radial base territory, consisting of Nashville, Tennessee, and points within 15 miles thereof and Murfreesboro, Tennessee; and that it should have been given the right to transport general commodities between the said base area and "points and places in Georgia, North Carolina, South Carolina, those in Alabama on and east of U. S. Highway 31, and those in Florida on and north of Florida Highway 30."[5]

In the Commission's report and order of January 6, 1945, it reaffirmed the findings made in a prior report on reconsideration, dated July 1, 1943, 42 M. C. C. 349. The extent of the operat-

[4] Appellant also holds extensive authority granted in another proceeding (No. MC–20783 (Sub. No. 1)) and set forth in Appendix B to the Commission's report of January 6, 1945.

[5] Paragraph VI of complaint. The Commission has classified as "radial" that type of operation which is conducted between a central "base area" and an outlying peripheral area. Radial operation is analogous to movement along the spoke of a wheel, between the hub and the circumference. Conversely, the pattern of operation is designated as "nonradial" when transportation is furnished between any points lying within the territory which a carrier serves. See *Classification of Motor Carriers*, 2 M. C. C. 703, 709; *Goncz* v. *United States*, 48 F. Supp. 286 (D. Mass., 1942). That appellant's operations are "radial" is undisputed.

ing authority there granted was the same as that granted in a prior report and order of May 29, 1941, 29 M. C. C. 359. That order was entered before this Court's decision on March 2, 1942, in *United States* v. *Carolina Freight Carriers Corporation,* 315 U. S. 475, and was set aside by the United States District Court for the Middle District of Tennessee, Nashville Division, on July 7, 1942, in Civil Action No. 258. The court concluded that it was impossible to say that in making its order of May 29, 1941, the Commission had applied the standards and tests prescribed in the *Carolina* case, and remanded the cause to the Commission for making the basic and essential findings required by the *Carolina* case.

On this appeal appellant contends, as it did in the court below, that the Commission's order of January 6, 1945, was in violation of the District Court's decree of July 7, 1942, in Civil Action No. 258; and that the Commission should have granted appellant authority to transport general instead of specific commodities; and that the Commission should have granted authority to operate from and to a base territory more extensive geographically than as delimited by the Commission in its order.

It is submitted by appellees that the appeal presents no substantial questions, and that the decree of the District Court should be affirmed without argument.

With respect to appellant's first contention, it is clear that the District Court's decree of July 7, 1942, in Civil Action No. 258, did not preclude the Commission from validly making its order of January 6, 1945. In fact the Court's decree setting aside the Commission's order of May 29, 1941, remanded the cause to the Commission for findings, and obviously invited, if it did not require, exercise by the Commission of its statutory function of considering, passing upon, and deciding the issues involved in the proceeding in accordance with applicable law and the evidence of record. Plainly the decree did not prevent the Commission from taking such action.

Nor could the District Court's decree dealing with the Commission's order of May 29, 1941, constitute a determination, under the doctrine of *res judicata,* that the Commission's subsequent order of January 6, 1945, is in any respect unlawful or invalid. The mere fact that the same parties are involved in a second suit in the same court would not make the rule of *res judicata* applicable to a separate, subsequent order of the Commission any more than that rule would be applicable in a second tort action by appellant against a railroad company for damages arising out of a second collision between the railroad company's trains and appellant's trucks.

The District Court's decision of July 7, 1942, did not prescribe what result the Commission should reach upon properly applying the appro-

priate legal standards in passing upon appellant's application. That court merely held that it was not satisfied that such standards had been applied in reaching the order then under review, an order issued prior to the date of this Court's decision in the *Carolina* case. The Commission has now conscientiously endeavored to apply the standards set forth by this Court in the *Carolina* case, and has reached the decision embodied in the order of January 6, 1945. This decision cannot be overthrown by a mechanical application of the rule of *res judicata,* merely because the operating authority granted is identical in extent with that delineated in the previous order. Just as in the case of the solution to a problem in arithmetic, the fact that the same answer was arrived at by the right process as had previously been reached by other methods does not invalidate the Commission's conclusion. Appellant's contention on this point is obviously unsound.

Nor does appellant stand on stronger ground in challenging the geographical and commodity restrictions contained in the Commission's order. The decisions of this Court, particularly the *Carolina* case itself, make it plain that the precise scope of the operating authority to be granted to a motor carrier making application under the "grandfather clause" is for the Commission to determine, upon the evidence of record. Both the geographical area to be served, and the commodities transportation of which is to be author-

ized, are matters which must be determined by the Commission, in the light of the evidence as to applicant's operations on and since June 1, 1935, the "grandfather" date.

It is well-settled that proof of substantial (and not merely nominal, sporadic, or incidental) service is required; that the commodities which a carrier is authorized to transport may be limited to particular specified commodities, when it appears that substantial service performed by it in the past has been confined to such commodities, the carrier's "holding out" or willingness to transport general commodities being properly disregarded when no substantial service of that character has been performed by the applicant; and that an applicant's status may vary in different parts of the territory served, its service in one direction, for example, being different from that in the opposite direction.

These principles are summarized in the *Carolina* case as follows:

> The precise delineation of the area or the specification of localities which may be serviced has been entrusted by the Congress to the Commission. * * *
>
> It is plain that a carrier's holding out and actual performance may be limited to a few articles only. That is to say, he may be a common carrier only of a restricted number of commodities. * * * Or the service actually rendered may have been confined to such a few commodities

> that his holding out or willingness to carry a much larger class may be disregarded. * * * an applicant's status may vary from one part of the territory to another or be different in north-bound shipments than in south-bound shipments. (315 U. S. at 480, 483, 486.)

Other recent decisions of this Court upholding the Commission's imposition of commodity restrictions and geographical restrictions, respectively, are *Deaton Truck Line, Inc.* v. *United States,* No. 215, October Term 1945, aff'd October 9, 1945, and *Howard Hall, Inc.* v. *United States,* No. 627, October Term 1945, aff'd May 6, 1946.

The basis of the Commission's denial of authority to serve the metropolitan area within 15 miles of Nashville as part of appellant's base territory is clearly shown by the following extract from the Commission's report:

> As previously stated, applicant seeks as one of its base territories, Nashville and all points within 15 miles thereof. Although there are a number of small towns and villages within that area, a study of the abstracts of shipments discloses that Nashville is the only point within that area ever served by applicant either prior or subsequent to the statutory date. Shipments from one point only, during the representative periods of 1935, 1936, and 1937, is, in our opinion, insufficient to establish "grandfather" rights to serve all points within a thickly populated area 30 miles in

> diameter. Therefore, since Nashville is the only point ever served within the area sought we conclude that applicant's Nashville base territory should be confined to Nashville.

In view of the foregoing facts found by the Commission, it is obvious that its order rests upon a "rational basis" and should not be disturbed by this Court on appeal. *Rochester Telephone Corp.* v. *United States,* 307 U. S. 125, 146.

With respect to commodity restrictions it is equally plain that the Commission's order was sustained by the facts and was fully warranted by the principles established in the *Carolina* case. In this connection the Commission found, as to service from Murfreesboro:

> In view of applicant's very limited actual outbound service from Murfreesboro prior to the statutory date (the transportation of only one commodity, cheese), we may disregard its claimed holding out to transport general commodities. * * *

With respect to operations out of Nashville, the Commission found:

> A study of Appendix D discloses that applicant transported 371 shipments outbound prior to June 1, 1935. All but 10 of these consisted of the perishable commodities of meat, butter, cheese, poultry, and eggs. The other 10 shipments consisted of 5 of cotton bags, 4 of cellophane, and 1 of drums. In 1935, after the statutory date,

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applicant transported 155 shipments and all but 9 of these consisted of meats, butter, cheese, poultry, and eggs. The other 9 consisted of 2 shipments of cotton piece goods, 2 of cellophane, and 1 each of paint, felt, felt basing, felt base rugs, and felt base carpeting.

The aforementioned movements of drums, paint, and cellophane were small less-than-truckload shipments, ranging in weight from 23 to 679 pounds per shipment, from Neuhoff Packing Co., and Swift & Co., to Swift & Co. Four of the shipments of cotton bags were consigned to Swift & Co., and 1 was consigned to "Armour Fert Wks." All of the non-perishable commodities transported during the critical period may reasonably be presumed to have been accommodation shipments for the packing companies for whom applicant transported perishable commodities. Of the non-perishable commodities transported by applicant in 1935, after the statutory date, only cellophane moved prior to the statutory date. Cotton piece goods falls within the same general class of commodities as cotton bags but the other commodities do not fall within the same general class with any commodity that moved prior to the statutory date.

Applicant's outbound operations were expanded in 1936 and 1937. In 1936, over 600 shipments were transported outbound of which 36 consisted of commodities other than packing-house and dairy products, poultry, and eggs. Of these only 1 and

part of another shipment consisted of cellophane scrap and none of these shipments consisted of cotton piece goods or cotton bags. Although applicant transported several commodities in 1936 and 1937 that were not transported outbound prior to the statutory date, its principal outbound operations continued to be the transportation of the aforementioned perishable commodities. The sporadic transportation of the 3 non-perishable commodities transported by applicant during the critical period, even if we assume that they were not accommodation shipments for the packing plants served, is insufficient to broaden applicant's special-commodity service comprising the transportation of packing-house and dairy products, poultry, and eggs, all of a perishable nature, into a general-commodity service embracing numerous unrelated classes of property.

Obviously, the specialized service actually rendered outbound has not been consistent with applicant's alleged holding out of a much broader service, and therefore we believe that its claimed holding out to carry a much wider variety of commodities should be disregarded. We conclude that applicant has been engaged in bona fide operations outbound on and continuously since June 1, 1935, as a motor common carrier of only special classes of commodities; packing-house products, dairy products, poultry, and eggs.

Concerning the commodities transported to Nashville from destination territory, the Commission found:

> A review of the evidence previously set forth herein discloses a wide variance between applicant's purported holding out and its actual operations on and prior to June 1, 1935. Its outbound operations were limited to a narrow group of commodities according to the State and individual points served. Its inbound shipments from Alabama, with one exception, North Carolina, and South Carolina, with one exception, consisted of cotton-factory products. Similarly all shipments from Georgia points inbound during the critical period were of cotton-factory products, except those of sugar and granite which were confined to specified points. Inbound shipments from Florida consisted of entirely different commodities than those from the other States. For instance no fruits and vegetables were originated at points in any State other than Florida, coffee originated only at Jacksonville, sugar at Savannah and Port Wentworth, and granite at Elberton. Obviously applicant could have secured other commodities inbound and could have secured such commodities as sugar, coffee, and granite from other points within the destination territory sought, if it had endeavored to conduct a regular general commodity operation. It is clear, therefore, that applicant restricted its inbound operations to

the transportation of the respective commodities described and from the particular points and areas set forth above, and the grant of authority herein will be limited accordingly.

It is a well known fact, of which we may take judicial notice, that Birmingham is an important iron and steel center; however, only one shipment of such commodities was transported from there prior, and one subsequent to the statutory date. There are also a number of well known and important ports, and industrial and distribution centers, such as Nashville, Birmingham, and Mobile, Ala., Augusta and Savannah, Ga., Jacksonville and Tampa, Fla., Charlotte, Raleigh, and Wilmington, N. C., and Charleston and Columbia, S. C., included in the involved territory which ship and distribute a wide variety of commodities. However, only coffee was transported from Jacksonville, and sugar only from Savannah and Port Wentworth. Granite was shipped from only one point, Elberton, Ga., and no fruits and vegetables or peanuts originated in Alabama or Georgia prior to the statutory date although the record shows that the principal commodities moving from these two States to the Nashville area were sugar, peanuts, fruit, and canned goods, and that Georgia has big marble quarries. Considering the points and territory served by applicant it is inconceivable that it was unable to secure shipments of more and varied commodities and that such

commodities as sugar, coffee, and granite could not have been obtained from other points if it had endeavored to render a regular general-commodity operation.

In view of the foregoing facts, it is clear that the Commission was correct in holding that appellant was not a carrier of general commodities. The essential distinction between a carrier of general commodities and a carrier of special commodities is that the former, unlike the latter, transports a "*wide variety*" of commodities, a "*large group*" of articles. (*Carolina* case, 315 U. S. at 483, 484, 486). The question for decision by the Commission in each case where it must determine in which of these categories a particular carrier is to be placed is whether the applicant's coverage of commodities is sufficiently broad and representative to support a finding that the carrier was rendering a *bona fide* comprehensive service to the public in the trasnportation of the whole range of general commodities available for transportation. The very generality and variegated character of the service rendered by a carrier transporting a multiplicity of general commodities might result, as an extreme case, in his having transported a particular item only on a few occasions, or once, or even not at all. But appellant's operations are not of that sort. Appellant transported repeatedly and in great volume the particular commodities in which it specialized, rather than handling a *bona fide* assortment of miscellaneous articles constituting the

"wide variety" which the law requires in order to qualify as a carrier of general commodities.

Appellant views the *Carolina* case as forbidding commodity restrictions once it is found that plaintiff is a common carrier. But, as has been stated above, the *Carolina* case expressly holds that common carrier status is not incompatible with limitations authorizing transportation of only special commodities. A common carrier may be a common carrier of special commodities or even of only one commodity. Notwithstanding this narrow range of service, the carrier, if serving the public generally with respect to shipments of that commodity, would be a common carrier, and not a contract carrier or private carrier. The rules which the *Carolina* case establishes with respect to the consequences attached to the status of a common carrier of general commodities become applicable only after it has first been determined that the applicant is a common carrier of general commodities. That is the case only after it has been established that the applicant has transported a sufficiently wide variety of commodities to warrant the conclusion that the carrier is affording the shipping public *bona fide* service covering the whole range of its transportation needs (other than those relating to shipments requiring special equipment and not included within the designation "general commodities"). Obviously, upon the evidence of record in this case, the Commission could not properly have found that appellant

was performing *bona fide* service as such a common carrier of general commodities.

Appellant's contention that the Commission did not view the evidence as a whole, but analyzed it geographically, is merely a repetition of the argument which was rejected by this Court in *Howard Hall Company* v. *United States,* No. 627, October Term 1945, affirmed May 6, 1946. Likewise, appellant's claim that the Commission "refused to consider" certain evidence is as unimpressive here as it was in the *Howard Hall* case. The Commission's report clearly shows that it gave appropriate consideration to all pertinent evidence,[6] and it is obvious that appellant's objection to the Commission's action amounts to nothing more than an assertion that the Commis-

[6] Appellant urges that the Commission should have considered the variety of commodities transported in appellant's regular route operation between Nashville and Atlanta in determining whether or not appellant was entitled to authority to transport general commodities in its irregular route operation, involved in the present suit. Manifestly it was proper for the Commission to recognize the nature of these separate and different operations, and not to commingle or confound the evidence relating to them. With regard to the regular route operation, the Commission granted authority to transport general commodities, and that part of the Commission's order of January 6, 1945, is not involved in the present suit. Obviously the evidence relating to the regular route operation could not be reutilized as proof of a different operation, in support of a second grant of operating authority either to the same or to another applicant. *Akin* v. *United States*, 62 F. Supp. 391 (W. D. La., 1945), aff'd March 11, 1946; *United States* v. *Rosenblum Truck Lines*, 315 U. S. 50, 53, 54.

sion, in the exercise of its discretion, reached a result different from that desired by appellant. But it is well-settled law that determination of the weight, credibility and value of evidence is a function entrusted to the Commission. The fact that the Commission's action may not harmonize with certain evidence does not indicate any refusal on the part of the Commission to accord appropriate consideration to such evidence. It indicates merely a lack of probative weight in that evidence, the determination of which is the function of the Commission alone. The record clearly shows that the Commission's findings were warranted by and in conformity with the evidence.[7]

[7] The exhibits showing transportation performed, and the late-filed exhibit showing the extent of the casual and incidental shipments of cellophane, bags, *et cetera*, which appellant hauled for the accommodation of the packing houses it served (Tr. 37-40), make it abundantly clear that the only *bona fide* service rendered by appellant during the "grandfather" period is that which the Commission's order authorizes appellant to continue to perform. Even the oral testimony of appellant's witness corroborates the findings of the Commission with respect to the limited and restricted character of service performed (Tr. 36, 38, 61). Appellant relies heavily upon the testimony of the witness that appellant handled all commodities which moved within the territory served (except stoves); but in the light of the facts of general knowledge, of which judicial notice may be taken, regarding the location and character of the industries and traffic available in the territory served, it is obvious that the Commission, in weighing the value of the evidence, was not required to place implicit faith in an obviously incorrect statement made by an interested witness. This is particularly true when the statement is contradicted by the more specific testimony of the same witness, as well as by all the documentary evidence.

For the foregoing reasons, it is clear that this appeal presents no substantial question. It is, therefore, respectfully submitted that the judgment of the District Court should be affirmed.

(S) J. Howard McGrath,
J. HOWARD MCGRATH,
Solicitor General.

(S) Daniel W. Knowlton,
DANIEL W. KNOWLTON,
Chief Counsel, Interstate Commerce Commission.

AUGUST 1946.

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